62

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No. 06-1411

Supreme Court, U.S.
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In the Supreme Court of the United States

BARBARA SNOW-ERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
ROBERT S. GREENSPAN
PETER R. MAIER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a federal prisoner's claim that the United States Parole Commission erred in determining his parole expiration date and therefore improperly extended his confinement by 311 days was excluded from the Federal Tort Claims Act's waiver of sovereign immunity because it "ar[ose] out of * * * false imprisonment" which was not an "act[] or omission[] of [an] investigative or law enforcement officer[] of the United States Government." 28 U.S.C. 2680(h).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Ali v. *Federal Bureau of Prisons*, cert. granted, 127 S. Ct. 2875 (2007) 10
Block v. *Neal*, 460 U.S. 289 (1983) 7
Molzof v. *United States*, 502 U.S. 301 (1992) 6
Mt. Homes, Inc. v. *United States*, 912 F.2d 352 (9th Cir. 1990) 5
Pooler v. *United States*, 787 F.2d 868 (3d Cir.), cert. denied, 479 U.S. 849 (1986) 9
Sami v. *United States*, 617 F.2d 755 (D.C. Cir. 1979) 9
Squaw Valley Dev. Co. v. *Goldberg*, 395 F.3d 1062 (9th Cir. 2005) 8
Thomas-Lazear v. *FBI*, 851 F.2d 1202 (9th Cir. 1988) 7
United States v. *Neustadt*, 366 U.S. 696 (1961) 6, 7
United States v. *Shearer*, 473 U.S. 52 (1985) 7
Wilson v. *United States*, 959 F.2d 12 (2d Cir. 1992) 9
Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 8

Statutes: Page

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2
28 U.S.C. 2241 ..... 2, 3
28 U.S.C. 2671 *et seq.* 2
28 U.S.C. 2674 2
28 U.S.C. 2675 4
28 U.S.C. 2675(a) 4
28 U.S.C. 2680(c) 10
28 U.S.C. 2680(h) 2, 4, 6, 7, 8, 9, 10
21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11017, 116 Stat. 1824 8
18 U.S.C. 4203(b)(4) (1994) 9
18 U.S.C. 4213(d) (1994) 9
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2

Miscellaneous:

Restatement (Second) of Torts (1965) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 470 F.3d 804. The order of the district court granting the United States' motion to dismiss (Pet. App. 9-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2006, and amended on December 6, 2006. A petition for rehearing was denied on January 23, 2007 (Pet. App. 35). The petition for a writ of certiorari was filed on April 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the government's sovereign immunity and renders the United States liable for certain tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Congress expressly excluded from that waiver of immunity, however, claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, [and] abuse of process." 28 U.S.C. 2680(h). A plaintiff nevertheless may bring suit for such torts if they arise out of "acts or omissions of investigative or law enforcement officers of the United States Government." *Ibid.* An "investigative or law enforcement officer" is "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

2. In 1984, petitioner's decedent Darrow K. Erlin pleaded guilty in the United States District Court for the District of Nevada to conspiring to manufacture and attempting to manufacture methaqualone, in violation of 21 U.S.C. 841(a)(1), 846. Pet. App. 2, 9-10, 31. The court sentenced him to three years of imprisonment and five years of probation, with all but six months of the sentence of imprisonment suspended. *Ibid.*

In 1988, Erlin pleaded guilty in the United States District Court for the Northern District of California to possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). That court sentenced him to ten years of imprisonment and eight years of supervised release. Pet. App. 2, 10, 31. Because the California conviction violated the terms of his Nevada probation,

Erlin's previously suspended two-year sentence for the methaqualone conviction was reimposed. The Bureau of Prisons (BOP) correctly determined Erlin's mandatory release date by aggregating the two sentences into a 13-year term of imprisonment. *Id.* at 2-3, 10.

Erlin was released from prison in 1995 and was arrested the next year for driving under the influence of alcohol. Pet. App. 3, 10. He failed to report that violation to his parole officer. *Ibid.* As a result of the arrest and his failure to report, the district court for the Northern District of California revoked his supervised release for the cocaine conviction and sentenced him to six months of imprisonment. *Ibid.* The United States Parole Commission (Commission), in turn, revoked Erlin's parole and ordered him to serve an additional 20 months of imprisonment. *Ibid.*

In 1997, Erlin filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Central District of California, challenging the jurisdiction of the Commission to order him to serve an additional term of imprisonment. Pet. App. 3, 10-11. The district court granted the petition, reasoning that, because the Sentencing Reform Act of 1984 had rendered Erlin's cocaine conviction non-parolable, the Commission's postconfinement jurisdiction over Erlin was limited to his initial three-year Nevada sentence. That parole had expired by the time he was arrested for driving under the influence. The district court therefore held that, at the time of his 1996 arrest, the Commission lacked jurisdiction to require that he serve an additional period of imprisonment. *Id.* at 3, 11. The government did not appeal the district court's decision, and Erlin was released. *Id.* at 3.

3. In 1999, Erlin filed suit against the United States "for personal injury resulting from the negligent incar-

ceration of plaintiff by the government's employees." Pet. App. 3.[1] He claimed that "the Parole Commission * * * failed to exercise due care" in determining his parole expiration date and keeping him in custody without legal authority to do so. C.A. E.R. 4; see Pet. App. 3-4. Following Erlin's death in 2002, petitioner Barbara Snow-Erlin took over his claim on behalf of his estate. *Id.* at 4.

a. The government initially moved to dismiss Erlin's suit on the ground that the two-year statute of limitations on FTCA suits had expired before Erlin filed his claim. Pet. App. 22. The district court granted that motion, holding that petitioner's cause of action accrued on the date when the Commission erroneously calculated Erlin's parole expiration date. See *id.* at 31-34. Petitioner appealed, and the court of appeals reversed, holding that the cause of action did not accrue until the district court held in Erlin's habeas action that he was unlawfully confined. *Id.* 19-30; see *id.* at 11-12.

b. On remand, the government moved to dismiss the action for lack of subject matter jurisdiction, invoking the bar on tort claims arising out of false imprisonment. 28 U.S.C. 2680(h). The district court dismissed petitioner's complaint with prejudice. Pet. App. 18. Although petitioner argued that the complaint stated a claim of negligence, not false imprisonment, the district court determined that "the alleged acts of governmental negligence (miscalculating plaintiff's parole expiration date and/or failing to ensure it was properly calculated)" were "precisely" the type of conduct "that would render

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[1] Erlin first filed an administrative complaint, as required by 28 U.S.C. 2675, with the BOP. That agency referred the complaint to the Commission. C.A. E.R. 6. This suit followed the Commission's failure to act on the complaint. *Ibid.*; see 28 U.S.C. 2675(a).

plaintiff's extended incarceration 'false' or unlawful" and thus "giv[e] rise to the barred tort of false imprisonment," for which Congress had not waived immunity. *Id.* at 17-18.

4. a. The court of appeals affirmed. Pet. App. 1-8. It noted that petitioner had "couche[d] her claim in terms of negligence" but recognized that it was required to "look beyond [the party's] characterization to the conduct on which the claim is based" in order to determine whether the claim fell within the waiver of sovereign immunity in the FTCA. *Id.* at 7 (brackets in original) (quoting *Mt. Homes, Inc.* v. *United States*, 912 F.2d 352, 356 (9th Cir. 1990)). The court also explained that the question "[w]hether a claim for negligent miscalculation of a release date arises out of false imprisonment for purposes of the FTCA [wa]s a question of first impression" for any appellate court. Pet. App. 6-7. Because "[t]he only harm [petitioner] alleged is that the United States kept Erlin imprisoned for 311 days too long," the court concluded that petitioner "cannot sidestep the FTCA's exclusion of false imprisonment." *Id.* at 7-8.

b. Petitioner filed a petition for rehearing, arguing for the first time (see Pet. 4) that the court's dismissal was "inconsistent" with the provision of the FTCA that "does not bar claims 'arising out of' intentional torts committed by 'law enforcement officers.'" Pet. for Reh'g 2. The court of appeals denied the petition without comment. Pet. App. 35.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Petitioner argues (Pet. 6-11) that the court of appeals misinterpreted the phrase "false imprisonment" as it is used in 28 U.S.C. 2680(h). This case appears to be the first in which a court of appeals has decided whether a prisoner can sue the United States in tort for miscalculating his release date. See Pet. App. 6-7 ("Whether a claim for negligent miscalculation of a release date arises out of false imprisonment for purposes of the FTCA is a question of first impression for this court and, so far as we can determine, for any federal appellate court."). Given the relative rarity with which the question arises and the absence of any conflict among the courts of appeals, this Court's review is not warranted.

As petitioner acknowledges (Pet. 9), she seeks only error correction, but there was no error. The court of appeals correctly held that petitioner's claim "aris[es] out of * * * false imprisonment," 28 U.S.C. 2680(h), and therefore is excluded from the FTCA's waiver of sovereign immunity. The scope of the FTCA's exclusion of certain intentional torts, including false imprisonment, is "by definition a federal question." *Molzof* v. *United States*, 502 U.S. 301, 305 (1992); see *United States* v. *Neustadt*, 366 U.S. 696, 706 (1961) (noting that "the intended scope of the Federal Tort Claims Act * * * depends solely upon what Congress meant by the language it used in § 2680(h)").

Contrary to petitioner's assertion (Pet. 6), the court of appeals did not look to state law to determine the meaning of "false imprisonment" in the FTCA. The court instead stated simply that because "[t]he only harm alleged is that the United States kept Erlin imprisoned for 311 days too long," petitioner stated no claim "[i]ndependent of that alleged false imprison-

ment." Pet. App. 7-8. That conclusion comports with the "traditional and commonly understood legal definition" of false imprisonment. *Neustadt*, 366 U.S. at 706; see *Block* v. *Neal*, 460 U.S. 289, 296-297 & n.6 (1983). "[C]onfinement otherwise than by arrest under a valid process is customarily called a false imprisonment." Restatement (Second) of Torts § 35 cmt. a (1965). In this case, it is undisputed that the Parole Commission was without jurisdiction to order Erlin's continued confinement. Pet. App. 3; see C.A. Supp. E.R. 14 (underlying habeas court finding that "the Parole Commission lacked statutory authority to include any portion of [Erlin's] ten-year sentence in its computation of [Erlin's] parole expiration date"). Erlin therefore was held for 311 days without valid legal authority. His claim for damages from that wrongful confinement squarely "aris[es] from * * * false imprisonment." 28 U.S.C. 2680(h).[2]

Petitioner's arguments to the contrary are unavailing. As described above, Erlin was not "confined by a valid legal process." Pet. 9. Although the arrest that led to his detention and his six-month sentence for violating the terms of his supervised release may have been lawful, the period of confinement for which petitioner claims damages was without authority. Petitioner also appears to draw a distinction between false imprisonment and malicious prosecution. Pet. 8 n.1. Both torts,

[2] Petitioner does not appear to challenge the court of appeals' conclusion that "the gravamen of the complaint is a claim for false imprisonment" rather than negligence. Pet. App. 7. Nor could she. It is well established that Section 2680(h) excludes claims "that sound in negligence but stem from" an excluded tort like false imprisonment. *United States* v. *Shearer*, 473 U.S. 52, 55 (1985) (opinion of Burger, C.J.); *Thomas-Lazear* v. *FBI*, 851 F.2d 1202, 1206-1207 (9th Cir. 1988).

however, are excluded from the government's waiver of sovereign immunity, 28 U.S.C. 2680(h), and the distinction is therefore of no practical significance.

2. Petitioner's argument (Pet. 9-11) that the law enforcement exception to the general bar on suits against the government for false imprisonment applies to this case was not presented to the district court or the court of appeals in a timely manner. As petitioner acknowledges, she raised that issue only in her petition for rehearing. Pet. 4; see Pet. for Reh'g 2-5. The issue was therefore waived. See, *e.g.*, *Squaw Valley Dev. Co.* v. *Goldberg*, 395 F.3d 1062, 1064 (9th Cir. 2005) (noting that court of appeals generally reviews only issues distinctly raised in party's opening brief). "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (citation omitted).

In any event, the law enforcement exception does not apply and there is no conflict among the courts of appeals that would justify review. Section 2680(h) waives the government's sovereign immunity to suits arising out of false imprisonment if the tort has been committed by a "law enforcement officer." 28 U.S.C. 2680(h). The statute defines "law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

Petitioner's complaint arises out of a wrongful act of the Commission.[3] C.A. E.R. 6-7. Petitioner contended

[3] Congress has since repealed the Commission's authority over most federal prisoners. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11017, 116 Stat. 1824.

throughout the proceedings below that Erlin's wrongful incarceration was the result of errors made by the Commission in its parole determination. *Id.* at 3-4. And in petitioner's underlying habeas proceeding, the district court concluded that petitioner was improperly confined because the Commission acted outside of its jurisdiction. Pet. App. 3. Petitioner's contention (Pet. 10) that Erlin was "incarcerated by officials of the Bureau of Prisons," Pet. 10, is beside the point: Erlin's false imprisonment was the result of an error by the Commission, as petitioner's complaint states repeatedly. C.A. E.R. 3-4, 6-7.

Members of the Parole Commission were not "law enforcement officers" within the meaning of Section 2680(h). See *Wilson* v. *United States*, 959 F.2d 12, 15 (2d Cir. 1992). Their statutory authority included the ability to "request probation officers" to take certain law enforcement actions, but members of the Commission were not themselves authorized to take such actions. 18 U.S.C. 4203(b)(4) (1994). The Commission could issue warrants for arrest, but those warrants had to be executed by a "Federal officer authorized to serve criminal process." 18 U.S.C. 4213(d) (1994). Nor did the Commission (or its delegates) have authority to execute searches or seize evidence. See *Wilson*, 959 F.2d at 15.[4]

[4] Because there is no question that Parole Commissioners are not "law enforcement officers" within the meaning of the FTCA, this Court need not address the scope of the law enforcement exception, an issue on which the courts of appeals appear to have reached different results. Compare *Pooler* v. *United States*, 787 F.2d 868, 872 (3d Cir.) (waiver of sovereign immunity "limited to activities in the course of a search, a seizure or an arrest"), cert. denied, 479 U.S. 849 (1986), with *Sami* v. *United States*, 617 F.2d 755, 764-765 (D.C. Cir. 1979) (stating in dictum that law enforcement proviso meant to provide a tort remedy for "law enforcement abuses" more broadly). The lack of any development of this issue in the court of appeals further counsels against review.

The law enforcement exception therefore does not apply to petitioner's claim, and her suit is barred by the Federal Tort Claims Act.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
PETER R. MAIER
Attorneys

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[5] This case does not implicate the question presented in *Ali* v. *Federal Bureau of Prisons*, cert. granted, 127 S. Ct. 2875 (2007). *Ali* concerns the proper interpretation of the phrase "any other law enforcement officer" in 28 U.S.C. 2680(c), which precludes the government's liability in tort for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer*." *Ibid.* (emphasis added). Although Section 2680(h) also uses the phrase "law enforcement officer," it defines that phrase "[f]or the purpose of [that] subsection." 28 U.S.C. 2680(h); see pp. 2, 8, *supra*. The two subsections therefore are independent of one another.